IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

FRIDAY, THE 23RD NOVEMBER 2007 / 2ND AGRAHAYANA 1929

Crl.Rev.Pet.No. 3818 of 2007(B)

M.C. NO. 25/2006 of SUB DIVISIONAL MAGISTRATE, MUVATTUPUZHA

REVN. PETITIONER: COUNTER PETITIONER

C.P.KUNJAN @ THANKAPPAN,
S/O.SHANKARAN, POLAKULAM HOUSE, KOOVAPADY.

BY ADV. SRI.PHILIP T.VARGHESE

RESPONDENTS: STATE AND PETITIONERS

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1. STATE OF KERALA, REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

2. LONAPPAN, S/O.PAILY,
THOPILAN HOUSE, AIMURYKARA, KOOVAPADY VILLAGE,
ERNAKULAM DISTRICT.

3. V.V.VENU, S/O.VELAYUTHAN PILLAI,
VAZHAPILLY HOUSE, AIMURYKARA, KOOVAPADY
VILLAGE, ERNAKULAM DISTRICT.

BY ADV. SRI. C.M. NAZAR, PUBLIC PROSECUTOR

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 23/11/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON CRL. M.A. NO. 11215/2007 IN CRL.R.P. NO. 3818/2007

DISMISSED

23.11.2007 SD/- V. RAMKUMAR, JUDGE.

/True Copy/

P.A to Judge.

V. RAMKUMAR , J

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CRL.R.P. NO. 3818 OF 2007

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Dated this the 23rd day of November, 2007.

ORDER

The revision petitioner, who was the counter petitioner in M.C. No. 25/2006 on the file of the Sub Divisional Magistrate, Muvattupzha, challenges the order dated 03.08.2007 passed by the Sub Divisional Magistrate purportedly under Section 138(1) Cr.P.C.

2. The Sub Divisional Magistrate was moved by respondents 2 and 3 herein under Section 133 Cr.P.C alleging that a sluice thodu passing through the property of the revision petitioner was obstructed by the revision petitioner herein and thereby causing public nuisance to the applicants before the Sub Divisional Magistrate.

3. On 23.09.2006 the Sub Divisional Magistrate passed a conditional order under Section 133(1) Cr.P.C. After receipt of the conditional order, the revision petitioner herein who was the counter petitioner filed objections before the Sub Divisional Magistrate contending inter alia that there was no such thodu as

alleged and that there was no obstruction to the public thodu as alleged. Thereafter the matter drifted aimlessly. Finally, as per the impugned order dated 03.08.2007 the Sub Divisional Magistrate, relying on the report of the Village Officer, Koovappady and the report of the Executive Engineer, PVIP, Division No.1, Perumbavoor, made the conditional order absolute directing the revision petitioner to reconstruct the thodu immediately on receipt of the order. It is the said order which is assailed in this revision.

4. I heard both sides. The legal position is that when the opposite party appears and shows cause against the conditional order, the Magistrate has to conduct an enquiry and record the evidence as if in a summons case. The burden of proof in an enquiry under Section 138 Cr.P.C is on the party at whose instance the proceedings were initiated. [(1966 KLT 1100)-**Balan v. State of Kerala** and (1977 KLT 329)-**Ayisumma v. Nabeesa Umma**] Even when the opposite party who denies existence of the public way or public water course fails to appear at a subsequent stage, the Magistrate cannot automatically make

the conditional order absolute. He will have to take evidence on behalf of the complainant.(See 1968 KLT 889- **Ittiathikunjan v. Lakshmikuttiamma**, 1961 KLT 617- **Ambi v. State of Kerala**, **Sankaran v. Kunjukrishnan** (1968 KLT 859)] After taking evidence, the Magistrate should be satisfied that the conditional order is reasonable and proper. It is thereafter that he has to pass the final order either making the conditional order absolute with or without modifications. The impugned order cannot be supported since the Magistrate did not conduct an enquiry nor did he take an evidence either in support of the complaint or in support of the denial. The impugned order is accordingly set aside. The matter is remitted to Sub Divisional Magistrate, Muvattupuzha for disposal afresh. The parties shall appear before the learned Magistrate without any further notice on **18.12.2007**. The Magistrate shall dispose of the M.C. in accordance with law.

The Crl.R.P is disposed of accordingly.

V. RAMKUMAR, JUDGE.

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